A

NG SIEW LAN

v.

JOHN LEE TSUN VUI & ORS

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[CASE NO: K22-236-2006-I]
25 MAY 2011

C ***CONTRACT:*** *Sale and purchase of land - Solicitor - First defendant solicitor for plaintiff in land transaction - Plaintiff issued letter of discharge to first defendant - Whether plaintiff aware of consequence of signing discharge letter - Whether first defendant owed duty to plaintiff after letter was issued - Whether plaintiff had proved the same - Whether*
D *first defendant breached duty to plaintiff - Land owner was a bankrupt - Whether first defendant should conduct bankruptcy search on land owner - Official Assignee did not claim interest to land - Whether defendants should be held responsible for omission of Official Assignee*

E ***LEGAL PROFESSION:*** *Solicitors - Duty of care - First defendant solicitor for plaintiff in land transaction - Plaintiff issued letter of discharge to first defendant - Whether first defendant owed duty to plaintiff thereafter - Whether first defendant breached said duty*

The plaintiff, a Sabahan, had appointed the 1st defendant as her
F solicitor in a land transaction to which she was the purchaser. The vendor in the sale and purchase agreement was the 3rd defendant who was granted the Power of Attorney ('PA') by the registered land owner. The plaintiff had made payment to convert the land from a native land to a country lease ('conversion sum'), in
G addition to the purchase price of the land. This was the plaintiff's claim against the 1st defendant and his law firm, the 2nd defendant, for the said two sums. The plaintiff contended that the 1st defendant had failed to advise her that she was entitled to reject the 3rd defendant's request with regards to payment of the
H conversion sum. It was discovered that the registered owner was a bankrupt at the material time. The plaintiff submitted 1st defendant should have conducted a bankruptcy search on the owner, in addition to the land search done by him. The plaintiff also contended that the 1st defendant had failed to take steps to
I ensure that the registered owner had in fact granted the PA to

the 3rd defendant, as the PA was found to be forged. The 1st defendant and 2nd defendant in their defence, submitted that the plaintiff had terminated the retainer *vide* a discharge letter signed by her. They further submitted that they have conducted themselves in accordance with the standard of practice of the local legal profession. The issues to be determined were *inter alia*: (i) whether the 1st and 2nd defendants owed the plaintiff a duty to exercise reasonable skill and care in respect of the conveyance; and (ii) whether there was a breach of the said duty.

Held (dismissing the plaintiff's claim with costs):

(1) The letter of discharge that the plaintiff and the 3rd defendant signed was not prepared by the 1st defendant. The plaintiff was fully aware of the consequence of her signing the letter. It was not clear from the words of letter, whether the plaintiff would hold the 1st and 2nd defendants responsible for their action, after it was issued. In view of this uncertainty it was the plaintiff's duty to prove her case, to which she had failed. *Abrath v. North Eastern Railway Co* (foll). (paras 11 & 15)

(2) The 2nd defendant had made the relevant search on the land by extracting a certified copy of the title deed and had caveated the land on the basis of the sale and purchase agreement. Given the circumstances of the facts that was all he could have done, before the release of the purchase price to the 3rd defendant. With regards to the bankrupt status of the land owner, the Official Assignee should have claimed his interest in the land, to which he had failed. This omission could not be ignored and the 1st defendant and 2nd defendant should not be held responsible for it. (paras 19 & 22)

(3) With regards to the PA, the situation in Sabah was such that there was no proper system of registration. This meant that there was no way of checking the authenticity of the PA, short of calling the donors and the Commissioner for Oaths to enquire on the matter. It would be too onerous a duty to require the solicitor to investigate the PA which on the face of it was proper. *Lee Chee Kiang v. Johnson Tan Teck Seng & Anor* (foll). (paras 23 & 24)

Case(s) referred to:
Abrath v. North Eastern Railway Co [1883] 11 QBD 440 ***(refd)***
Agroco Plantation Sdn Bhd & Anor v. Besharapan Sdn Bhd & Ors [1998] 5 CLJ 19 HC ***(refd)***
Lee Chee Kiang v. Johnson Tan Teck Seng & Anor [2011] 1 LNS 277 HC ***(refd)***

Legislation referred to:
Land Ordinance (Cap. 68) Sabah, s. 88

For the plaintiff - Baldev Singh; M/s Baldev Gan & Assocs
For the defendant - Terrence Lee; M/s Lam & Co

Reported by Melinda Robert

JUDGMENT

David Wong Dak Wah J:

Proceeding

[1] The plaintiff's claim against the 1st & 2nd defendants is for the sum of RM600,000 being the purchase price paid and the additional sum of RM100,000 being the amount paid for conversion of the native land to that of a country lease. This loss is premised on the ground that the 1st and 2nd defendant had breached their duty of care as solicitors for the plaintiff both in tort and contract in handling a sale and purchase transaction of a native land (NT01384190) situated at Kampong Laut, Inanam, Sabah and containing an area of 1.72 hectares more or less (native land). The claim is denied by the defendants on the ground that they had been discharged by the plaintiff by a letter dated 14 October 2003.

Background Facts

[2] The plaintiff together with Yu Ah Kaw and Joseph Ling had at the end of July 2003 gone to the office of the 1st and 2nd defendants for the purpose of engaging the services of the 2nd defendant in respect of a sale and purchase agreement of the native land. Relevant instructions were given to the 1st defendant, the result of which was a sale and purchase agreement between the 3rd defendant acting as the purported attorney of the registered owner of the native land, as the vendor and the plaintiff, as the purchaser. The sale and purchase agreement was executed by the plaintiff before the 1st defendant on or about 29 July 2003.

[3] The relevant terms of the said S&P Agreement included the following:

(i) Clause 1: "… the Vendor shall sell and the Purchaser shall purchase the said Property free from all encumbrances and with vacant possession".

(ii) Clause 2: "The Purchase Price shall be Ringgit Malaysia Four Hundred and Fifty Thousand (RM450,000.00) only (hereinafter referred to as the Purchase Price).

(iii) Clause 10: "… if the Vendor shall fail or be unable to transfer and deliver vacant possession of the said Property to the Purchaser as provided under Clause 7 herein due to any reasons whatsoever, the Purchaser may forthwith or at any time thereafter at her option elect either to:

(a) enforce specific performance of this Agreement; or

(b) rescind this Agreement in which case the Vendor shall refund without interest all monies already paid by the Purchaser to the Vendor …"

(iv) Clause 17: "The Purchaser shall bear and pay all the legal fees, stamp duties and registration fees of and incidental to the preparation execution stamping and registration of this Agreement and the transfer of the said Property together with the premium, if any, for the transfer of the said Property".

[4] After the payment of the purchase price of RM450,000, the plaintiff and 3rd defendant agreed that an additional sum of RM150,000 is to be paid. After the additional sum of RM150,000 was paid, both the 3rd defendant and the plaintiff instructed the 1st defendant to present the memorandum of transfer to the Central Land Office at Kota Kinabalu, Sabah for registration. The transfer of the native land by the end of November 2003 was still not processed at the Central Land Office. The plaintiff was then notified by the 1st defendant that the documents lodged by his firm at the Central Land Office at Kota Kinabalu, Sabah (including the land title and memorandum of transfer) had gone missing. It appears that the 3rd defendant may not have been the authorized attorney for the owner of the native land as she had alleged that she never signed such power of attorney to the 3rd defendant.

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Issues

[5] Parties have agreed on the issues to be determined by the court and they in my view are properly framed and they are as follows:

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1. Whether the 1st and 2nd defendants owed the plaintiff in contract a duty to exercise reasonable care & skill and, in tort a duty to exercise reasonable care and skill ("the said duty") in respect of the conveyance as pleaded at para. 20 of the statement of claim dated 26 December 2006?

C

2. If the answer to 1 above is in the affirmative, then whether the 1st and 2nd defendants have breached the said duty as pleaded at para. 20 of the statement of claim?

D

3. If the answer to two above is in the affirmative then whether the plaintiff have suffered the loss and damage as pleaded at para. 22 of the statement of claim?

4. If the answer to three above is in the affirmative then whether the plaintiff is entitled to the reliefs prayed for under the statement of claim?

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5. Whether the plaintiff's claim is time barred?

Issue 1

F

Whether The 1st And 2nd Defendants Owed The Plaintiff In Contract A Duty To Exercise Reasonable Care & Skill And, In Tort A Duty To Exercise Reasonable Care And Skill ("The Said Duty") In Respect Of The Conveyance As Pleaded At Para. 20 Of The Statement Of Claim Dated 26 December 2006?

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[6] Paragraph 20 reads as follows:

The said 1st and 2nd defendants breached the above duty of care:

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Particulars

1. In the circumstance of the case the 1st Defendant failure to act with reasonable and proper caution in a transaction where the registered owner of land was purportedly dealing indirectly through her agent or Attorney.

I

2. Failure to either properly verify or obtain affirmation directly from the registered owner that the PA was in fact granted to him to the 3rd defendant.

3. Alternatively, failure to take all reasonable and proper steps to verify and ensure that the registered owner had in fact executed the PA before a person who was at the material time actually and properly empowered by law to attest/witness the registered owner's signature in the purported PA. Such steps included conducting a search of the registry kept at the office of the Registrar, Commissioners of Oaths Division, Federal Court, Malaysia, Palace of Justice, Putrajaya.

4. By reason of the 1st Defendant's failure as stated in subparagraphs (1), (2) and (3) above, the 1st Defendant wrongly relied on the said purported PA when it turn out the purported signature of the registered owner in the purported PA was forged. As a consequence, the purported PA together with any instrument including the said S & P agreement executed under the purported PA is also void and/or unenforceable.

5. When the Plaintiff sought the advice of the 1st Defendant on the threatened repudiation, the latter failed to advise the Plaintiff that she was entitled to reject the demand for the additional RM150,000.00 and that the remedy of seeking an Order for specific performance was available to her.

6. By reason of the Defendant's above failure as stated in paragraph (5) above the Plaintiff felt pressured to surrender to the 3rd Defendant's demand and paid an additional sum of RM150,000.00.

[7] The starting point which I need to deal with is the letter dated 14 October 2003 written by the plaintiff and the 3rd defendant. The 1st and 2nd defendant of course are relying on that letter to deny their liability and in view of the importance of this letter to this dispute, I reproduce it here:

Ng Siew Lan
(NRIC No. 680105-12-5232)
Lot 29, Taman Kepayan Phase I
88200 Kota Kinabalu

And

A Omar Bin Safturni
(NRIC No. 831223-12-5443)
4010, Taman Good Hope
Jalan Sin On
91000 Tawau

B Date: 14 October 2003

M/S Vincent Wong & Co.
Advocates & Solicitors
Suite 8.12, 8th floor, Block A
Kompleks Karamunsing
C 88300 Kota Kinabalu

Dear Sirs,

Re: Sale and Purchase Agreement dated 29 July 2003
NT 013084190, Kota Kinabalu
D

We refer to the above and the Sale and Purchase Agreement dated 29 July 2003 prepared by your firm.

We confirm that we have entered into an arrangement amongst
E ourselves and hereby discharge your firm from all liabilities or responsibilities under the above Sale and Purchase Agreement dated 29 July 2003 and hereby further relinquish all our rights towards any action, claim, demand, proceeding against your firm as a result of any loss or damages suffered

F By us with effect from the date hereof.

Yours faithfully.

Signed	Signed
...	...
G (Ng Siew Lan)	(Omar bin Safturni)
	[as attorney for Jikilin bt Majitan]

[8] The words employed in the letter are crystal clear and that is the retainer of the 1st and 2nd defendant had been terminated by the plaintiff and they will not be held for any loss suffered by
H the plaintiff arising from this termination. The plaintiff in her testimony said that the letter was prepared by the 1st defendant and in effect saying that she did not know what she is signing and that letter should not absolve the 1st and 2nd defendant from their duty of care.

I

[9] I have seen the manner in which the plaintiff testified in court and I have found her to be an intelligent person and not one to sign any document without knowing the consequence. She

knew there is money to be made from the purchase of the native land and the conversion of the status of the native land to that of a country lease. She is a native by virtue of a native certificate which qualified her to own the native land. My view is corroborated by other objective evidence. Firstly, there was a change in the purchase price of the native land in the sum of RM150,000.

[10] The plaintiff in her evidence testified that she was threatened by the 3rd defendant that the purchase of the native land would be terminated if she did not pay an extra RM150,000 to him. Further it is alleged by her that the 1st defendant had advised her that the 3rd defendant had the right to demand the extra RM150,000. With respect, I find that hard to believe as the plaintiff had a binding agreement to purchase the native land at the agreed price of RM450,000. As I have said earlier, the plaintiff is not the one who can easily be threatened. Further I find also it is not reasonable for the 1st defendant as a lawyer to advice the plaintiff in the manner as alleged by the plaintiff. To justify my conclusion I refer to the following documents which are:

Omar Bin Safturni
4010, Taman Good Hope
Jalan Sin On
91000 Tawau

8th September 2003
Ng Siew Lan
9 Lot 29, Taman Kepayan Phase 1
88200 Kota Kinabalu

Dear sir,

Re: Letter of Undertaking
Between: Omar Bin Safturni
And: Ng Siew Lan
Property: NT 013084190, Kota Kinabalu

I refer to the above.

In consideration of you paying to me a sum of RM150,000.00 (in 2 cheques of RM50,000.00 and RM100,000.00 respectively) by today, I, the undersigned hereby agree and undertake to repay to you a total sum of RM817,500.00 on or before the 30th November 2003 which sum is made up as follows:

A

1. the sum of RM600,000.00 being the earlier received by me from you plus agreed interest thereon;

2. the sum of RM217,500.00 being the amount of RM150,000.00 now received by me plus agreed interest thereon.

B

In the event that the above property cannot be transferred to you on or before the 30th November 2003 as settlement of the said RM817,500.00, or you received any complaint from the landowner. I repeat my early undertaking to repay to you in full the said sum RM817,500.00.

C

Yours truly,

Signed

...
D (Omar Bin Safturni)

Witness by,

Ng Siew Lan
(NRIC No. 680105-12-5232, H0685314)
E Lot 29, Taman 3 Kepayan Phase 1
88200 Kota Kinabalu, Sabah, Malaysia AND

Jikilin Bt Majitan
(NRIC No. 390610-12-5174, H0016804)
F 564, Happy Garden
88300 Kota Kinabalu,Sabah, Malaysia

Date: 11th September 2003

Messrs. Vincent Wong & Co.
Advocates & Solicitors
G Suite 8.12, 8th 15 Floor, Block A
Kompleks Karamunsing
88300 Kota Kinabalu, Sabah.

Dear Sirs,

H

Re: Sale & Purchase Agreement dated 29th July 2003
Property: NT 013084190, Kg. Laut, Inanam, Kota Kinabalu, Sabah

We refer to the above matter and the letter of instruction to you
I dated 29th July 2003.

2. We hereby confirm and instruct you in the following manner: A

a. notwithstanding that the Purchaser has not paid the full Purchase Price to the Vendor, you are instructed to present the Memorandum of Transfer for registration at the District Land Office on 15th 30 September 2003;

B

b. you shall apply to the Lands and Surveys Department for the necessary permission for transfer of the said Property.

3. We further acknowledge that the above instructions are given to you despite any and all advice given to us and the above instructions shall remain valid and binding on you unless superseded by our subsequent instructions, whether verbal or written. We hereby agree to absolve you from all liability and responsibility as a result from your compliance with the above instruction and shall indemnify you against all loss and damage you may suffer or incur as a result of complying with the said instructions. C D

Yours faithfully,

Signed	Signed
Ng Siew Lan	Jikilin bt Majitan

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[11] For reasons stated above, I find that the letter of discharge was not prepared by the 1st defendant and thereafter signed by the plaintiff and the 3rd defendant. I also find that the plaintiff while signing this letter of discharge was fully aware of the consequences of her action. F

[12] With that I come to the issue as to whether this letter absolves the actions of the 1st and 2nd defendant prior to 13 October 2003. In deliberating on this issue, I need to look at the totality of the evidence before me especially the conduct of the plaintiff and the 3rd defendant. I have no doubt that the plaintiff was in control as to how the transaction should be handled and the transaction may be more than a usual sale and purchase of a piece of land. G

[13] At this juncture, I remind myself the duty of the plaintiff in proving her case which is clearly set out by Brett MR in *Abrath v. North Eastern Railway Co* [1883] 11 QBD 440 at p. 452 said this: H

> But then it is contended (I think fallaciously), that if the plaintiff has given *prima facie* evidence, which, unless it be answered, will entitle him to have the question decided in his favor, the burden of proof is shifted on to the defendant as to the decision of the I

> question itself. This contention seems to be real ground of the decision of the Queen's Bench Division. I cannot consent to it. It seems to me that the propositions ought to be stated thus: the plaintiff may give *prima facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favor: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given by both sides, whether they are satisfied in favor of the plaintiff with respect to the question which he calls upon to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff; they must find for the defendant. Then comes, this difficulty – suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case the burden of proof lies upon the plaintiff, and if the defendant has been able by additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him.

[14] It is not clear to the court that the plaintiff had proved that she holds the 1st and 2nd defendant responsible 'for their action after' the issuance of the letter of discharge dated 14 October 2003. The operative words in that letter are these:

> ... and further relinquish all our rights towards any action, claim, demand, proceeding against your firm as a result of any loss or damages suffered by us with effect from the date hereof.

[15] From those words, it cannot be said that the plaintiff did not absolve the 1st and 2nd defendant for their actions prior to the 14 October 2003. Any loss or damages in my view must refer to the actions of the 1st and 2nd defendant. In any event in view of the uncertainty of the meaning of that letter and since it is the duty of the plaintiff to prove her case, I can only find that she had failed in her burden of proof that the 1st and 2nd defendant were still retained by her after the letter of discharge. My finding is arrived at by applying the principles set out by Brett MR in *Abrath v. North Eastern Railway Co (supra)*.

[16] In the event I am wrong in my finding, I now deal with issue 2.

Issue 2

If The Answer To 1 Above Is In The Affirmative, Then Whether The 1st And 2nd Defendants Have Breached The Said Duty As Pleaded At Paragraph 20 Of The Statement Of Claim?

[17] In the case of *Lee Chee Kiang v. Johnson Tan Teck Seng & Anor* [2011] 1 LNS 277 – K22-129-2007, I said this on the law on the standard of skill and care of legal practitioners in Sabah:

> ... In *Midland Bank v. Hett Stubbs & Kemp* [1979] Ch 384, Oliver J emphasized that a solicitor should not be judged by the standard of a "particularly meticulous and conscientious practitioner ... The test is what a reasonably competent practitioner would do having regarded to the standards normally adopted in his profession ..." What that entails requires the court to find out what the standard of the Sabah legal profession is in respect of the works expected of the 1st defendant to perform and if he has acted in accordance to that practice, he would not be negligent. This test is a restatement of what is held in the *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 at p. 121 as follows:
>
> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art ... in the case of a medical man, negligence means failure to act in accordance with the standards of a reasonably competent medical men at the time ... I myself would prefer to put in this way, that he is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it the other way around, a man is not negligent if he is acting in accordance with such practice, merely because there is a body of opinion who would take a contrary view ... a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds.
>
> The Bolam test has not been followed in the jurisdiction of Australia. King Chief Justice in *F v. R* [1982] 33 SASR 189 held as follows:
>
> > ... professions may adopt unreasonable practices ... The court has an obligation to scrutinize professional practices to ensure that they accord with the standard of reasonableness imposed by the law ... the ultimate question, however, is not whether the defendant's conduct accords with the practices of his profession or some part of it, but

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> whether it conforms to the standard of care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community

B

This view has been confirmed by the High Court of Australia in *Rogers v. Whitaker* [1992] 175 CLR 479 where it was held that opinions of medical witnesses are not decisive but merely guidelines for the court who will be the final arbiter on what that standard of care should be.

C

In the context of Malaysia, we have the celebrated case of *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2002] 2 MLJ 129 where the Federal Court departed from the Bolam principle and adopted the principle stated in the *Rogers* case. The Federal Court said this:

D

> ... the Bolam test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment (paragraph 36 MLJ)

E

F

It is the contention of counsel for the defendants that the Bolam test still applies to the legal profession as the question posed to the Federal Court was very specific in that the decision relates purely to medical negligence. For completeness the posed question is this:

G

> Whether the Bolam test as enunciated in *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER in the area of medical negligence should apply in relation to all aspects of medical negligence'

H

With respect to counsel, her approach is inappropriate. The Federal Court was dealing with the duty of care of a professional body and whatever principles distilled from that judgment in my view are applicable to other professions. In fact the Federal Court had referred to other profession and this can be seen from this paragraph of the judgment:

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> ... there is a need for members of the medical profession to stand up for the wrong doings, if any, **as is the case of professionals in other professions**. In so doing, people involved in medical negligence cases would be able to obtain

better professional advice and that the courts would be appraised with evidence that would assist them in deliberations' (paragraph 69 MLJ) (emphasis added)

Accordingly it is my view that the Bolam principle is no longer applicable and the applicable principle is as stated in the Federal Court.

[18] With that, I shall deal with the alleged breach as contained in the plaintiff's counsel submission.

[19] The contention of the 1st and 2nd defendant is that they had conducted their duties of care professionally and in accordance with standard of practice by the local legal profession. In this case, upon instruction by the plaintiff, the 1st defendant had made the relevant search on the land by extracting a certified copy of the title deed and caveated the same on 31 July 2003 on the basis of the sale and purchase agreement between the plaintiff and owner through the use power of attorney by the 3rd defendant. These actions according to the 1st defendant and in the circumstances of this case were all he could do before the release of the purchase price to the 3rd defendant.

[20] The plaintiff's rebuttal is that the 1st defendant should have made searches on the bankruptcy status of the land owner and authenticity of the power of attorney.

Bankruptcy Search

[21] It is undisputed that the land owner was a bankrupt at the material time without the knowledge of all the parties which gives rise as whether there is a duty to make a search on the part of 1st defendant prior to the release of the full purchase price. The relevant circumstance here is the undisputed reality that in 2003 there was no online search until 2006. According to Mr Christopher Chin (DW1), a senior practitioner in his testimony, in relation to one off land transactions it is not a standard practice but it would always be a requirement of the purchaser's financier. I accept Mr Chin's testimony.

[22] It is contended that the bankruptcy status of the landowner is irrelevant as good title can still pass despite the transferor being a bankrupt at the material point in time. As authority, counsel for the defendants relies on the judgment of His Lordship Richard Malanjum J (as he then was) in *Agroco Plantation Sdn Bhd & Anor v Besharapan Sdn Bhd & Ors* [1998] 5 CLJ 19 where it was held

A that there was no automatic vesting of the subject land in the official assignee and that being so, the transfer of the ownership of the landowner would have the effect of passing the interest notwithstanding the bankruptcy. Section 88 of the Land Ordinance states that no new title and no dealing with claim to
B or any interest in any land, except land held under native customary tenure without documentary title shall be valid until it has been registered. In this case, the official assignee had not claimed his interest in the land title. This omission by the official assignee cannot be ignored in my deliberation and it is my view
C that 1st and 2nd defendant should not be held responsible for the omission. In this case, the plaintiff had wanted to release the money as soon as possible to ensure she has the deal 'stitched up' so to speak and to conduct a bankruptcy search would be impractical during the then environment of legal practice. In any
D event, the 1st defendant had conducted a search and lodged a caveat on the land. That in 2003 was all the 1st defendant could do.

Searches On The Power Of Attorney

E **[23]** The situation in Sabah as far as power of attorney is concerned is as what it is as there is no proper system of registration as in West Malaysia. That simply means that there is no way of checking the authenticity of a power of attorney short
F of calling the donors and the Commissioner for Oaths to enquire whether the power of attorney is genuine.

[24] In my judgment of *Lee Chee Kiang (supra)*, I said that it would be too onerous a duty to require a solicitor to investigate a power of attorney which on the face of it is proper. I also said
G that a properly executed power of attorney should be accepted unless cogent reasons show otherwise and what those reasons are depends on the circumstances of each case. In this case, I see no cogent reasons for any investigation on the power of attorney.

H **[25]** As for the legal effect of registration of power of attorney, my view is this. Registration *per se* of a power of attorney at the magistrate courts and Lands and Surveys Department do not give legitimacy to it. Registration in the magistrate court is nothing but a practice and provides nothing but comfort to the people relying
I on it. As for registration or notation in the Central Land Office, Kota Kinabalu, it is nothing but a procedural step which the Lands and Surveys Department requires before they can process

documents containing signatories executed pursuant to a power of attorney. The Lands and Surveys Department is only performing an administrative act when processing documents in their office and the registration and acceptance of the use of the power of attorney by the Central Land Office, Kota Kinabalu does not give legitimacy to the power of attorney if challenged later.

[26] I have no reason to depart from my view stated in *Lee Chee Kiang (supra)*. That was the practice in 2003 and in view of the prevalent use of forged power of attorney in recent times; the legal fraternity can expect the court to look at their duty of care in respect of use of power of attorney in a different manner for transactions of recent times. A more permanent solution would be for the legislature to create a new regime for power of attorney as a matter of urgency to ensure that business people and investors in the State can conduct their business with a minimum risk environment.

Issues 3, 4 And 5

- If The Answer To 2 Above Is In The Affirmative, Then Whether The Plaintiff Have Suffered The Loss And Damage As Pleaded At Paragraph 22 Of The Statement Of Claim?

- If The Answer To 3 Above Is In The Affirmative, Then Whether The Plaintiff Is Entitled To The Reliefs Prayed For Under The Statement Of Claim?

- Whether The Plaintiff's Claim Is Time Barred?

[27] In view of my decision on issue 1 and 2, there is no reason to deal with these issues.

Conclusion

[28] For all the reasons stated above, the plaintiff's claim is dismissed with costs to be taxed unless agreed to the defendants.